No. 18,520.

Supreme Court of the United States.

THE SCHUYLER NATIONAL BANK, OF SCHUYLER, NEBRASKA, AND WILLIAM H. SUMNER,
Plaintiffs in Error.

vs.

JAMES GADSDEN, GEORGE THRUSH, MATTIE N. THRUSH, AND THE NEBRASKA STATE BANK, OF SCHUYLER, NEBRASKA,
Defendants in Error.

ERROR TO SUPREME COURT OF THE STATE OF NEBRASKA.

Argument and Brief of Defendants in Error, Thrush.

There are no precedents directly in point. The principles involved are clear, and defendants by way of argument and brief desire to state the conditions and make the propositions upon which the case was decided, and upon which they ask this court to refrain from interfering with the decision of the Supreme Court of Nebraska.

STATEMENT OF FACTS.

A brief statement of the facts is necessary to clearly set forth the propositions involved.

George Thrush borrowed of the Schuyler National Bank the sum of $5,000.00, for which, with *Charles Thrush, Sr.*, as surety, he gave his note to that bank. Payments were made until, according to the bank when this suit was begun,

there was due $3,229.00, not deducting usury. *This is not the note sued upon, nor the note upon which judgment is asked.*

On the same day George Thrush and *Mattie N. Thrush* executed and delivered a note for $5,000.00 and mortgage on real estate securing the same, to Wm. H. Sumner, *both note and mortgage upon their face being straight to Sumner as an individual and without expressing any trust, and without designating Sumner to be any officer or trustee or agent.*

Sumner gave no consideration whatever for the note or mortgage, but it was understood orally that whatever he got on this note and mortgage he was to turn over to the Bank.

This transaction took place in the State of Nebraska, and while both parties, George Thrush and Mattie N. Thrush and William H. Sumner were residents of that State. This is the note and mortgage brought into this suit by the cross petition of Sumner, and upon which decree herein is founded.

The defendants, George Thrush and Mattie N. Thrush, severally by their separate answers, set up usury, which in this foreclosure suit they ask to have applied on the note and mortgage under the Nebraska Statute and rulings thereon of the Nebraska Court.

William H. Sumner, and after trial by intervention, the Bank itself, joined in this request, seeking the benefit of the Federal Statutes relative to National Banks.

The Supreme Court of Nebraska, in the decision sought to be reviewed herein, held that as to this note and mortgage from George Thrush and Mattie N. Thrush to William H. Sumner—they being instruments and contracts between individuals residents of Nebraska—the Statutes of Nebraska as interpreted by its Court, applied and governed; that is, that the Federal Statute as to usury respecting National Banks did not apply; this is so far as the foreclosure proceedings themselves go.

PROPOSITIONS.

1st. The defendants Thrush submit that there is no Federal question raised in this case.

This they base upon the fact that the note and mortgage to Sumner being written contracts clear on their face between citizens of Nebraska as individuals, and made in Nebraska, the legal significance and status of those instruments are purely matters within the exclusive sovereign powers of the State, and when sued upon in the courts of that State, the remedies as given by the laws of that State are the only ones available.

2d. That this note and mortgage to Sumner involved in this suit because they are Nebraska contracts between individuals without in themselves expressing any trust or fiduciary relation, *they are, and can only be contracts between the parties in them designated.* Any one else claiming any right or benefit in them, can establish such right or benefit, not upon the ground that *he is a party to the contracts*, but upon the ground *that he is entitled to* succeed or take the rights of some party to it. This can be done by assignment or by operation of law or fastening a trust upon the interest of such party to the contract. It can never be done by claiming as a party but only by claiming the rights of one who is a party.

Therefore we submit to the Court that this note and mortgage to Sumner is a note and mortgage to Sumner; and it not expressing any trust relation nor any official capacity, the Schuyler National Bank cannot sustain its rights upon the ground that it is a party to it instead of Sumner; it can only claim the substantial benefits that Sumner could enforce. Thus suppose that before any default and before maturity in this case, Sumner had denied that he was to account to the Bank for whatever he received on that note and mortgage, what would have been the remedy of the Bank? Surely not an action against George and Mattie N. Thrush; but an ac-

tion against Sumner to compel him to assign the note and mortgage to the Bank, or a decree ordering him whenever he received any moneys thereon to pay the same over to the Bank. In either event the remedy to the Bank would be given not because it was a party to this note and mortgage, but for the reverse, *because it was not a party to the instruments.* For if the Bank were a party to the instruments its rights would be measured by those instruments, and being in writing, no parol evidence could contradict the writings, and it would need no remedy against Sumner in order to show its rights.

Therefore the defendants submit that the Schuyler National Bank claims rights and benefits to the Sumner note and mortgage in suit, in this action because it is not a party to them, but through, by, or in the right of Sumner, who is a party.

3d. The Federal Statute respecting usury on the part of National Banks, by its terms applies only to those instruments made directly to the Bank; that is to promissory notes or contracts to which the Bank is a party. Or to state it another way, where the Bank has a legal interest as one of the parties named in the contract, as a party. If it claims to succeed to the legal interest of a party, it is then not a contract within the Federal Statute; and the Bank is claiming simply as assignee or asserting some equity to entitle it to the benefits of some party named in the contract. Upon this point defendants respectfully refer to the original opinion of the Supreme Court of Nebraska and the opinion on the rehearing in this action and appearing in the record herein and the reasoning and authority therein cited.

It appears from the evidence in this action that the Sumner note and mortgage were by the parties treated long after they were given as the property of Sumner, for when Thrush sold

a part of the mortgaged land to Marxen, two notes—one of $1,600.00 and the other of $400.00—were made to Sumner by Marxen to secure a release of that part of the land from this mortgage. This, the evidence shows, was done by the concurrence of defendants, Thrush, and written by Johnson, cashier of this Bank, and in the Bank itself.

Further, the note from George Thrush and Mattie N. Thrush to Sumner in positive expressed terms is "* * to pay to W. H. Sumner or order * *." The mortgage is "* * to have and to hold the premises above described with all the appurtenances thereunto belonging unto the said Wm. H. Sumner and *to his heirs and assigns* forever * *."

To claim the benefit of these specific contracts defendants submit that as to the note the Bank must come in under "or order," and as to the mortgage under "assigns"—whether this be worked by a legal endorsement or assignment or through equitable rights as equitable assignment.

It has been held that where a National Bank gets a note as the successor of a State Bank—by assignment—that the remedy for usury paid is not under the Federal Statute but under that of the State.

Exeter National Bank vs. Orchard, 39 Neb., 485.

This is deemed sound and is the exact principle which defendants contend is applicable in this case. It being a case where the Bank is not a party to the contract, but claims its right *through* or by one who is a party to it.

By the Federal Statute, a National Bank is forbidden to loan money on real estate security. It is admitted by defendants as a matter of law that this inhibition will not invalidate a mortgage on lands given to such a Bank nor prevent its foreclosure. That the Federal Government alone may forfeit the charter of the Bank. It certainly will not be

questioned that it is the duty of the Bank to honestly observe this inhibition; that it is the duty of the courts to so construe the Statute that an honest observance will be compelled. Therefore, in addition to the plain legal phase of this case, equally plain it seems to defendants is it, that the Bank should be so held, that when the Government brings process to enforce the Statute the Bank cannot evade it by proving that it took no mortgage on land, and where the State as to that very mortgage, attempts to enforce its remedy for usury say that it is protected by a privilege given by the very Statute which it violated, and under which it claimed as against the Government it did not act. A construction of the Statute which would permit such double dealing is not to be seriously considered as proper in a Court of Justice.

There is a further consideration. Under the laws of Nebraska, applicable to the note and mortgage, Mattie N. Thrush, by signing the note to Sumner, is liable for a deficiency judgment. She did not borrow any money of the Bank, and signed no note to the Bank. She could never have sued the Bank on account of usury, yet by her rights as a party to the Sumner note she is entitled to the remedies against usury, to lessen the amount of her liability.

Then, again, the note given to the Bank by George Thrush to evidence the $5,000.00 as loan and on which the usury was paid to the Bank, is not sued on in this action. Upon that note the Bank can at any time sue George Thrush and recover a personal judgment, and to that note in regard to usury the Federal Statute applies; so that its privilege under the Federal Statute is available to it whenever it sees fit to sue upon its contract, and only when it sues upon that contract.

Defendants, therefore, respectfully submit to the Court that the decision of the Supreme Court of the State of

Nebraska holding the Federal Statute inapplicable as to usury to the foreclosure proceedings upon the note and mortgage from George and Mattie N. Thrush to Wm. H. Sumner is correct, and that there arises upon said note and mortgage no federal question.

Respectfully submitted,

GEORGE THRUSH,

MATTIE N. THRUSH,

By GEORGE H. THOMAS and

FRANK DOLEZAL, their Attorneys.